

RECEIVED

**Before the
Federal Communications Commission MAR 19 2001
Washington, D.C. 20554**

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

In the Matter of

DOCKET FILE COPY ORIGINAL

Nondiscrimination in the Distribution of
Interactive Television Services Over Cable

)
)
)
)

CS Docket No. 01-07

To: The Commission

**Comments of the
Consumer Electronics Retailers Coalition**

Circuit City Stores, Inc.
RadioShack Corporation
Sears, Roebuck & Co.
International Mass Retail Association
National Retail Federation

March 19, 2001

No. of Copies rec'd
List A B C D E

014

Table of Contents

I. The Commission Has Clear Jurisdiction Over All Issues Related To CPE and MVPD Services.....	2
II. The Subsidy Presently Received On A Discriminatory Basis By MSOs, But Not By Competitive Entrants, Limits Potential Competition For Interactive Services.....	3
III. Competition In The Interactive Services Market Requires That Cable MVPDs Themselves Rely On The Applications Made Available To Competitive Entrants.	4
IV. The Draft PHI License Also Constitutes A Barrier To CPE Competition In General, And Interactivity In Particular.	5
V. A Finding Of "Effective Competition" Should Not Absolve Cable MVPDs Of Obligations Related To Compliance With Section 304 Until That Section Has Sunset According To Its Own Terms.	6
VI. Conclusion	7

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Nondiscrimination in the Distribution of)	CS Docket No. 01-07
Interactive Television Services Over Cable)	
)	

To: The Commission

**Comments of the
Consumer Electronics Retailers Coalition**

The Consumer Electronics Retailers Coalition ("CERC") respectfully submits these comments in response to the January 18, 2001 Notice of Inquiry ("NOI") issued by the Federal Communications Commission ("FCC" or "Commission") in the above-captioned proceeding.¹

As the Commission notes, customer premises equipment in general, or the cable navigation device (or, in implementations thus far, "set-top box") in particular, constitutes one of the three essential "legs" for supporting interactive services related to broadband audiovisual ("video") programming. The Commission also notes that cable operators are uniquely situated to provide *both* interactively delivered video programming and interactive services that rely on two-way, broadband capacity. For these reasons, this proceeding is critical for consumer electronics retailers.

Throughout this Notice, the Commission expresses concern over competition. Consumer electronics retailers are among those potential competitive entrants that

¹ *In the Matter of Nondiscrimination in the Distribution of Interactive Television Services Over Cable*, CS Docket No. 01-7, *Notice of Inquiry* (Rel. Jan. 18, 2001)(the "NOI").

Congress expected, in Section 304 of the 1996 Telecommunications Act, to provide competition that would enhance and enliven the market for customer premises equipment and (through such competition) ancillary services, as occurred after telephone CPE deregulation. As the Commission notes, despite the passage of five years, such competitive entry has not yet occurred.

CERC agrees with the Commission that there is significant overlap between the issues posed in this NOI and those pending in the Year 2000 Review in CS Docket No. 97-80.² In these comments, CERC focuses on the issues that are of common importance to the successful resolution of the questions raised in these proceedings.

I. The Commission Has Clear Jurisdiction Over All Issues Related To CPE and MVPD Services.

As the Commission notes, Section 304 of the 1996 Telecommunications Act requires the FCC to assure competitive availability of devices necessary for the receipt of *all* services offered by an MVPD.³ Thus, in the case of CPE, the FCC need not determine whether interactivity is a part of the "video program service" or is a separate service.⁴ In either case, cable MVPDs are under a clear legal obligation to support the competitive availability of any device necessary for receipt of the service.

As the NOI also notes, issues as to the effectiveness with which these obligations have been complied with to date, and what further steps may be

² *In the Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Docket No. 97-80, *Further Notice of Proposed Rulemaking and Declaratory Ruling* (Rel. Sept. 14, 2000)(the "Year 2000 Review"). Accordingly, CERC requests that all filings of CERC, and its members who have made separate filings (Circuit City and RadioShack [formerly Tandy]) in CS Docket No. 97-80 be incorporated by reference into this Docket.

³ 47 U.S.C. § 549. The NOI notes in ¶ 35 that, aside from conditional access, for which a POD is required, competitive navigation devices must be available to perform "all other navigation functions."

⁴ See ¶¶ 14-17.

necessary by the Commission, are currently pending.⁵ Moreover, as will be discussed further below, issues as to self-dealing, discrimination, and anticompetitive limitations, relevant to support of interactive services,⁶ arise in connection with the “POD-Host Interface License (“PHILA”) as to which open issues remain in both CS Docket 97-80 and PP Docket No. 00-67. Clearly, then, the Commission has jurisdiction over at least one leg of the three-legged stool on which interactive services must rest.

II. The Subsidy Presently Received On A Discriminatory Basis By MSOs, But Not By Competitive Entrants, Limits Potential Competition For Interactive Services.

The Commission notes that the cable set-top box, controlled and distributed by the cable MVPD, offers a platform and opportunity for discrimination against ITV services offered by others, through design to favor, or support exclusively, services provided or contracted for by the cable MVPD. CERC believes that ample evidence confirming this potential will be adduced in this proceeding. Therefore, present practices of cable MVPDs, in distributing only to themselves, but not to competitive entrants, a subsidy from analog set-top boxes rentals, will profoundly aggravate and magnify these anticompetitive effects by ensuring that there will be little meaningful competition for the MVPD-provided navigation devices – either from competitive entrants to the navigation device market, or from competing services, such as DBS or telco providers, who lack such a subsidy pool with which to compete in the CPE marketplace.

⁵ See ¶¶ 35–36 and n.29.

⁶ See ¶¶ 20–24, 29–36.

In the Year 2000 Review in CS Docket 97-80, cable MVPDs have admitted that they engage in such self-dealing. As an example in the Washington, D.C. metropolitan area: a price list recently distributed by Comcast indicates that the monthly rental fees for analog and digital converters that provide conditional access to programming are *identical* – despite the fact that analog converters are magnitudes cheaper, have likely already been fully amortized, and are being recycled from households converted to digital service.

Clearly, if competitors wishing to provide competitive services and competitive navigation devices – already, as the Commission has noted, at an inherent disadvantage to cable MVPDs – are to have any chance of providing meaningful competition, the discriminatory conduct of cable MVPDs in refusing to spread this subsidy to competitive navigation device entrants must be addressed by the Commission in the Year 2000 Review.

III. Competition In The Interactive Services Market Requires That Cable MVPDs Themselves Rely On The Applications Made Available To Competitive Entrants.

The Commission notes in the NOI that cable MVPDs have the apparent power to favor proprietary interactive applications over those that would support competitive services and devices.⁷ Large scale evidence of this power has already appeared in the market for navigation devices. In the Year 2000 Review in CS Docket 97-80, the submissions of cable operators themselves include declarations of intention to support proprietary, interactive headend applications at the direct

⁷ *Id.*

expense of those that would support the OpenCable specifications made available to competitive entrants.⁸

This history forces the Commission to choose, as it notes,⁹ between highly regulatory and market-oriented solutions. The highly regulatory approach would be to monitor, on a day-to-day basis, whether every cable MVPD is in fact giving equal support to proprietary and non-proprietary headend applications that support interactive services. The market-oriented approach is simply to require that the devices distributed directly by the cable MVPDs themselves rely on the set of OpenCable specifications that the industry is making available to support the devices of competitive entrants. CERC will be submitting, in CS Docket No. 97-80, specific recommendations as to changes in FCC regulations that would impose this requirement on cable MVPDs by January 1, 2002.

IV. The Draft PHI License Also Constitutes A Barrier To CPE Competition In General, And Interactivity In Particular.

In both CS Docket 97-80 and PP Docket No. 00-67, the Commission has recognized pending issues as to the license by which the cable industry would license entrants seeking to compete with cable MVPDs in the CPE market. An incomplete, inadequate, and overly restrictive version of such a multi-industry agreement was filed with the Commission on December 15, 2000. Representatives

⁸ The only OpenCable set of specifications providing for interactivity, the "middleware" or "OCAP" ("OpenCable Access Platform") specification, provides for browser-like functionality in search of headend applications to support device features and functions. If applications resident at the cable headend are written for proprietary, but not OCAP, applications, the feature or function will not be available via the OpenCable-reliant device, but will be available via the proprietary, MVPD-distributed device. The cable MSO filings declaring an intention to support the latter at the expense of the former are discussed in the CERC Reply Comments in CS Docket No. 97-80. See also, with respect to the inadequacy of the OpenCable specifications, the Time Warner Petition For Reconsideration, as to labeling, in PP Docket No. 00-67. CERC requests that this petition and the CERC response also be included by reference in this proceeding.

⁹ NOI ¶¶ 40-41.

of the three major industries whose members seek to compete in offering interactive navigation devices – CERC, CEA and ITI – have requested that the Commission (as it did in the case of telephone CPE deregulation and the “RJ11 jack” license) publish this license for comment.

In this NOI, the Commission has observed that the POD device, supplied by the cable MVPDs to support the “right to attach” of competitive entrants, bears the technical potential to impose restrictions on the competitive device operation that would not be imposed on cable MVPD-provided devices. This is of clear concern, but only part of the story. The PHI License imposes restrictions on the operation of the competitive navigation devices *themselves* – some of which have little or nothing to do with the specification or operation of the POD or the POD-Host interface. Thus, the terms of this license agreement – separate and apart from any technical imposition inherent in the PODs themselves – impose discriminatory restrictions on interactivity, interactive services, and the devices that would support such services. This is one more reason why the Commission should, without further delay, publish this crucial draft license for public comment.

V. A Finding Of “Effective Competition” Should Not Absolve Cable MVPDs Of Obligations Related To Compliance With Section 304 Until That Section Has Sunset According To Its Own Terms.

The Commission seeks comment as to whether a finding of “Effective Competition” should be grounds for the Commission to suspend other activity aimed at protecting competitive entry.¹⁰ Were the Commission to take such an approach, any progress achieved in sustaining competition would likely be

¹⁰ NOI ¶ 23.

reversed. Such a finding cannot and should not be equated with completion of other responsibilities for several reasons:

- The discriminatory subsidy now enjoyed by cable MVPDs is available to no other competitor or competitive service. In addition to thwarting entry from navigation device producers, as presently limited it confers unreasonably large subsidies on incumbent cable MSOs, thwarting competition from other services, as well.
- As the Commission notes, the potential for DBS and narrowband competition with cable is clearly limited. In addition to DBS's inherent limitations as to broadband interactivity, there is a firm ceiling on the number of households that can or will support antennas with unobstructed views of the southern sky.
- The Commission recognized the unique challenges, in deregulating cable, when it decided to forebear in applying Section 304 to DBS services and devices. The job of deregulating the cable CPE market clearly is not yet done. Stopping the deregulation process and leaving in place inherent financial, technical and legal advantages of the entrenched monopolist is not deregulation at all, and would be directly contrary to congressional intention.

VI. Conclusion


The issues raised in this NOI, with respect to interactivity, highlight the critical nature – for any number of new services and industries – of completely and successfully deregulating the market for navigation devices, as ordered by the Congress in 1996. Congress, in passing Section 304, recognized that cable

navigation devices would provide either a gateway or a roadblock to new markets for technologies, devices, and services, just as equipment that plugged into telephone lines did in the narrowband world.

If it believes in competition, and in succeeding in the mission assigned by the Congress, the Commission should have no higher priority than moving expeditiously, in CS Docket No. 97-80, to complete the deregulatory process and dismantle all remaining competitive advantages enjoyed by cable MVPDs.

Respectfully submitted,

**CONSUMER ELECTRONICS RETAILERS
COALITION**



Alan McCollough
President and CEO

W. Stephen Cannon
Senior Vice President
and General Counsel
Circuit City Stores, Inc.
9950 Mayland Drive
Richmond, VA 23233
(804) 527-4014

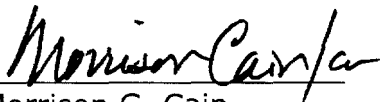


Leonard H. Roberts
Chairman and CEO


Ronald L. Parrish
Vice President
Industry and
Government Affairs
RadioShack Corp.
100 Throckmorton Street
Suite 1800
Fort Worth, TX 76102
(817) 415-3700



Paul Shay
Vice President,
Deputy General Counsel,
Services
Sears, Roebuck & Co.
3333 Beverly Road
Hoffman Estates, IL 60179
(847) 286-2500



Morrison G. Cain
Senior Vice President,
Government Affairs
International Mass
Retail Association
1700 North Moore Street
Arlington, VA 22209
(703) 841-2300



Don Gilbert
Senior Vice President,
Information Technology
National Retail Federation
325 7th Street, NW
Washington, DC 20004
(202) 783-7971

Of Counsel

Joe D. Edge
Mark F. Dever
Jennifer L. Blum
Drinker Biddle & Reath
1500 K Street, NW
Washington, DC 20005
(202) 842-8809

Robert S. Schwartz
Catherine M. Krupka
McDermott, Will & Emery
600 13th Street, N.W.
Washington, DC 20005
(202) 756-8081

March 19, 2001

Certificate of Service

I, Janet Davis, hereby certify that true copies of the foregoing Comments of the Consumer Electronics Retailers Coalition were served by hand on March 19, 2001, to the persons listed below.

Magalie Salas (Original and 4 copies)
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Robert Pepper
Federal Communications Commission
445 12th St., SW, Rm 7C-347
Washington, DC 20554

Chairman Michael Powell
Federal Communications Commission
445 12th Street, SW 8B-201
Washington, DC 20554

Amy Nathan
Federal Communications Commission
1445 12th Street, SW 7C-313
Washington, DC 20554

Commissioner Harold Furchtgott-Roth
Federal Communications Commission
445 12th Street, SW 8A-302
Washington, DC 20554

Jonathan Levy
Federal Communications Commission
1445 12th Street, SW, 7C-362
Washington, DC 20554

Commissioner Susan Ness
Federal Communications Commission
445 12th Street, SW 8B-115
Washington, DC 20554

William Johnson
Federal Communications Commission
445 Twelfth Street, S.W., #3C-754
Washington, D.C. 20554

Commissioner Gloria Tristani
Federal Communications Commission
1445 12th Street, SW 8C-302
Washington, DC 20554

Deborah Klein
Federal Communications Commission
445 Twelfth Street, S.W., #3C-754
Washington, D.C. 20554

Deborah Lathen
Federal Communications Commission
445 Twelfth Street, S.W., #3C-754
Washington, D.C. 20554

Thomas Horan
Federal Communications Commission
445 Twelfth Street, S.W., #3C-754
Washington, D.C. 20554

Rick Chessen
Federal Communications Commission
445 Twelfth Street, S.W. #2C-337
Washington, D.C. 20554


Janet Davis